

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 00-0208
Sales and Use Tax
For the Tax Years 1996, 1997, and 1998

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ISSUES

I. Assessment of Use Tax on the Purchase of Annual Reports and Proxy Statements.

Authority: IC 6-2.5-3-2; 45 IAC 2.2-3-21.

Taxpayer protests the assessment of use tax on the purchase of reports acquired from an out-of-state vendor and shipped to out-of-state locations.

II. Assessment of Use Tax on the Purchase of Videotapes.

Authority: IC 6-2.5-2-1; IC 6-2.5-4-1(b); 45 IAC 2.2-3-4; 45 IAC 2.2-4-2; Information Bulletin #34.

Taxpayer argues that its purchase of videotapes is not subject to the gross retail tax on the ground that it was actually purchasing a service from the supplier and the transfer of the actual videocassette was incidental to the service transaction.

STATEMENT OF FACTS

The taxpayer is an Indiana corporation with its commercial domicile in Indiana. Taxpayer sells items of clothing having 16 retail outlets in Indiana with other outlets located across the country. In its original protest letter, taxpayer also challenged the imposition of use tax on certain software maintenance contracts. During the hearing, the taxpayer withdrew that particular portion of its protest.

DISCUSSION

I. Assessment of Use Tax on the Purchase of Annual Reports and Proxy Statements.

Taxpayer arranged with an out-of-state vendor to prepare and print proxy statements and annual reports. Taxpayer specified that copies of the reports would be shipped by the vendor to recipients located both within Indiana and outside the state.

Under IC 6-2.5-3-2, “[a]n excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.” The Department’s regulations specify that certain transactions in which the taxpayer acquires tangible personal property outside the state are also subject to imposition of the use tax. 45 IAC 2.2-3-21 states that, “All purchases of tangible personal property which are accepted by the purchaser outside the state of Indiana but which are stored, used, or otherwise consumed in Indiana are subject to the use tax.”

Taxpayer acquired copies of its annual reports and proxy statement from its out-of-state vendor. Taxpayer’s agreement with and specific directions to the vendor indicated that certain of those annual reports and proxy statements would be shipped to locations within the state of Indiana. Those items of tangible personal property were properly subject to use tax under IC 6-2.5-3-2 because, although the items were acquired in Kentucky, they were shipped to and consumed within the state. However, those annual reports and proxy statements, which were sent to out-of-state locations, were not subject to the use tax because those items were neither acquired, consumed, stored, nor used within the Indiana.

Accordingly, to the extent that taxpayer acquired copies of annual reports and proxy statements outside the state and then arranged to have those same items consumed, used, or stored outside the state, taxpayer’s protest is sustained.

FINDING

Taxpayer’s protest is sustained.

II. Assessment of Use Tax on the Purchase of Videotapes.

Taxpayer arranged for vendors to prepare, script, edit, and produce advertising materials. These materials were transferred to videocassette with the taxpayer purchasing multiple copies of that original cassette. Taxpayer refers to the multiple copies as “dubs.” The taxpayer was billed for each “dub.” In most cases, the “dubs” were sent directly to radio and television stations for eventual broadcast. The audit determined that the “dubs” which were sent to Indiana locations were subject to the use tax. The taxpayer disagrees arguing that the vendors are furnishing the taxpayer with a service, that the tangible personal property – in the form of the individual videocassettes – is incidental to the vendors’ services, the cost of the videocassette is inconsequential to the service charge, and that the vendors pays retail or use tax on the purchase of the cassettes at the time it acquires those cassettes.

45 IAC 2.2-3-4 states that “[t]angible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.”

It is not disputed that the videocassettes constitute tangible personal property. It is not disputed that the videocassettes, which that the audit determined were subject to use tax, were “stored, used, or otherwise consumed in Indiana.” Id. It is not disputed that the vendors did not charge sales tax upon taxpayer’s original purchase of the videocassettes. Accordingly, taxpayer’s challenge to the assessment of use tax is necessarily predicated upon the assertion that its initial purchase of the videocassettes was not subject to sales tax.

Under IC 6-2.5-2-1, Indiana imposes a gross retail (sales) tax on retail transactions made within the state. A retail transaction, the pre-requisite to the imposition of the tax, is the transfer, in the ordinary course of business, of tangible personal property for consideration. IC 6-2.5-4-1(b). 45 IAC 2.2-4-2 describes those situations in which a service provider conducting transactions involving the transfer of tangible personal property, is liable for sales tax on those transactions. The regulation states that “[w]here, in conjunction with rendering professional services, personal services, or other services, the serviceman also transfers tangible personal property for a consideration, this will constitute a transaction of a retail merchant constituting selling at retail” 45 IAC 2.2-4-2(a).

Taxpayer purchased videocassettes from its vendors. Notwithstanding the fact that the preparation and duplication of the cassettes required the vendors to exercise various skills, the sales transactions were subject to the state’s gross retail tax because the taxpayer’s primary objective was the receipt of tangible personal property. The vendors’ duplication of videocassettes is analogous to the duplication of photographic prints described in Information Bulletin #34. That bulletin states, “In making additional photographic prints from an original negative or photograph, the photographer is producing and selling tangible personal property and the [sales] tax applies to the selling price of the prints” Undoubtedly, a certain skill and knowledge is involved in duplicating either photographic prints or videotape cassettes. However, the objective of either duplicating photographic prints or videotape cassettes is the transfer of tangible personal property. Therefore, because the initial transfer of the videotape cassettes was subject to sales tax and because the sales tax was never paid, the audit properly determined that taxpayer’s “dubs” were subject to the state’s use tax.

FINDING

Taxpayer’s protest is respectfully denied.

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